

WILDERNESS PUBLIC RIGHTS FUND
NATIONAL ORGANIZATION FOR RIVER SPORTS

IBLA 81-167

Decided March 31, 1982

Appeal from decision of District Manager, Medford Oregon, Bureau of Land Management, to approve the transfer of Rogue River outfitter's permit number 23.

Set aside and remanded.

1. Special Use Permits--Wild and Scenic Rivers Act

BLM's decision to approve a transfer of a permit for authorized use on the Rogue River, designated as a wild and scenic river pursuant to the Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1271 (1976), from one commercial outfitter to another is proper where it maintains the 50/50 allocation of river use between commercial outfitters and private boaters.

2. Rules of Practice: Appeals: Hearings--Special Use Permits

Where the Bureau of Land Management has dismissed a protest to the transfer of a special use permit for river rafting without considering evidence in the record which tends to support certain allegations in the protest, the case will be remanded to BLM for reconsideration of the evidence and a final determination of whether there has been a violation of the guidelines which state that an authorized outfitter's authorization to conduct float trips is not a salable commodity.

APPEARANCES: Levi J. Smith, Esq., Portland, Oregon, for appellants; Donald R. Lawton, Esq., Office of the Solicitor, for Bureau of Land Management; Gerald B. Wetlaufer, Esq., Washington, D.C., for YMCA, intervenor; Stephen E. Roady, Esq., Washington, D.C., for ECHO: The Wilderness Co., Inc., intervenor.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Wilderness Public Rights Fund (WPRF) and the National Organization for River Sports (NORS) groups, whose members are private boaters interested in access to the Rogue River, appeal from a decision of the District Manager, Medford, Oregon, Bureau of Land Management (BLM), dated October 28, 1980, to approve the transfer of Rogue River outfitter's permit number 23 from the present holder, Metropolitan YMCA of Alameda County, California (YMCA), to ECHO: The Wilderness Company, Inc. (ECHO).

The Rogue was created as one of the original wild and scenic rivers by the Act of October 2, 1968, 16 U.S.C. § 1271 (1976). This Act provides for a portion of the Rogue to be administered by BLM, and a portion to be managed by the Forest Service. On July 7, 1972, a combined plan of the Forest Service and BLM for the Rogue River was published in the Federal Register (37 FR 13408, July 7, 1972). This plan provided that regulation of boating in the wild segment would be initiated when necessary to achieve the objectives of the Act.

Based upon this plan and mounting evidence of increased boating pressures on the Rogue River, the Forest Service and BLM issued an order on December 19, 1973, closing the wild section to all outfitters and guides engaged in commercial operations except those obtaining a current letter of authorization. Such letters of authorization were issued to YMCA and ECHO based upon their 1973 level of use.

On August 22, 1980, the YMCA submitted a BLM request form for termination and transfer of its Commercial Outfitters Guide Permit, advising BLM of the sale of its rafting business to ECHO. In the same instrument, ECHO applied for a special use permit to cover the privileges referred to in the YMCA termination request. Approval of a permit transfer is required by the published controls for the river and by the four agency management group which manages the river. Under an agreement dated June 2, 1977, this group consists of the Forest Service, the Bureau of Land Management, and the State of Oregon acting through the State Marine Board and State Department of Transportation, Highway Division. A copy of the transfer application shows that the transfer was approved by BLM, the Forest Service, and the State.

By a letter dated September 16, 1980, John H. Garren, President of the Northwest Chapter of WPRF, on the behalf of WPRF and NORS protested the approval of this transfer by BLM. The protest contends that YMCA is selling its permit to ECHO and asks that the YMCA trips be made available to noncommercial users of the river. Garren's criticisms were answered in a letter from the district manager dated October 9, 1980, and in the district manager's decision dated October 28, 1980.

In that decision, BLM set forth the following rationale in support of its position to approve the transfer:

1. The transferee (ECHO) is one of the original Rogue Outfitters existing under the 1973 Closure Notice, therefore there is no question as to whether they qualify.

2. An evaluation indicates the transferee to be a reputable outfitter capable of providing a quality public service equal to or better than the current permit holder. This evaluation included a review of transferee qualifications, experience, past performance, financial backing, equipment, safety record, and other pertinent information deemed appropriate. Also, we know of no public complaints regarding ECHO's services.

3. An environmental evaluation indicates that any method of transfer or re-allocation would cause no known or changing impact to the river and land resources.

4. Alternatives to the proposed transfer have been considered and deemed inappropriate as follows:

Reallocation to non-commercial use - This alternative would only amount to about a 4% shift, and would require a modification of the approximate 50/50 use allocation beginning at Grave Creek. This would require Bureau of Land Management (BLM) and U. S. Forest Service (FS) policy changes, and review and approval by all four managing agencies, including public review. It has previously been determined that a) some members of the public are unable or unwilling to navigate the river on their own and prefer to pay outfitters for their services, and b) other users prefer to navigate with their own experience and equipment. Thus, the 50/50 division is still deemed valid, and we know of no feasible way passengers choosing to obtain guided services could do so without fixed outfitter schedules.

Reallocation to other commercial use by other administrative methods - Current regulations do not provide for other methods of transfer.

5. The proposed permit transfer is in accordance with the 1978 Federal Register Rogue River rule which indicates "An authorized outfitter's authorization to conduct float trips is not a salable commodity, . . . that commercial operations must be understood as being a privilege, not, a right, . . . and that any transfer of authorized use in conjunction with the sale of a business must be approved by the managing agencies prior to such a transfer." YMCA listed the needed approvals in the terms of their sale, and all permits transferred are without charge.

In their statement of reasons, appellants contend that by approving the transfer, BLM has acquiesced in a transaction which promotes the economic interests of commercial enterprises at the expense of the boating public; that the transfer is an outright sale of future river starts between commercial outfitters; that the transfer would cause an increase in the river use and thus an environmental assessment report should be filed; that the transfer would perpetuate an inequitable allocation of

commercial versus noncommercial river use; that BLM has illegally delegated its authority to allocate river use to a private outfitter.

Appellants request leave to later file a supplement to their statement of reasons. Appellants explain that they requested "a district policy drafted in the spring of 1980 concerning permit transfer procedures," mentioned in a letter of December 8, 1980, from BLM district manager to John Garren. Appellants state that it is necessary to review this policy before they complete their statement of reasons. Appellants also request an evidentiary hearing so that the implementation of that policy on the transfer may be fully developed.

In its answer, BLM contends that private boaters do have a fair opportunity to use the river as shown by the records of actual use; that there is a rational basis for balancing the competing uses on the river and thus the 50/50 allocation cannot be considered arbitrary; that there is no dispute that the authorization for river use is not a salable commodity; that the regulations recognize that a continuity in the issuance of yearly permits does exist; that an environmental analysis was prepared which concluded that the transfer would not have a significant impact on the environment; that BLM, the Forest Service, and the State Marine Board have followed a practice of approving a transfer of an outfitter's assets unless the potential transferee lacks qualifications, other just causes exist, or the river and land are unable to sustain the use.

BLM also urges that appellants' request to file a supplemental statement of reasons and request for a hearing be denied. BLM explains that the "district policy draft" referred to in appellants' request was sent to them on December 1, 1980, and that this draft is merely a rough suggestion which has not been adopted as policy by BLM. BLM stated that all transfers are still controlled by the 1978 standards. Accordingly, appellants' request for a hearing is hereby denied.

YMCA's and ECHO's motions to intervene in this appeal were granted by the Board's order dated March 11, 1981. YMCA filed an opposition to appellants' request for an evidentiary hearing. It also filed an answer in which it contends that BLM was charged with the responsibility to make a decision regarding the transfer on the basis of certain specified criteria found in the 1978 Federal Register Rogue River rule. YMCA asserts that BLM's decision to approve the transfer was made on the basis of those criteria.

ECHO states that BLM did not err in approving the transfer. It asserts that the transfer is legal, consistent with BLM policy and the historic pattern of river permit transfers, and causes no inequities in river use allocation.

In appellants' "Response to Answer and Supplemental Statement," appellants stress that YMCA and ECHO refuse to provide information relating to the purchase price involved in the proposed transaction and what assets, tangible and intangible, ECHO is acquiring for its money. Appellants attached a memorandum dated August 1, 1980, from

the Inspector General to the Director, National Park Service, regarding the problem of transfer of river user days between commercial interests. In that memorandum the Inspector General discusses issues similar to those raised by appellant and recommends against approval of the proposed transactions.

ECHO filed a reply on May 11, 1981, in which it stated that the Inspector General's memorandum fails to support appellants' argument because (1) these recommendations are directed to the National Park Service which operates pursuant to a set of laws different from the Bureau of Land Management, and because (2) the recommendations in the memorandum were not followed by the National Park Service in any event.

[1] The YMCA permit number 23, authorizes float trips which have been designated for use by commercial outfitters pursuant to the 50/50 allocation of river use between commercial outfitters and public boaters that was recommended by the Rogue River Policy Review Group as an acceptable Rogue River use level. After considering various alternatives for disposing of the permit, BLM followed the recommendation in the environmental assessment (EA) to approve the proposed transfer. The EA cited the following rationale as a basis for recommending approval of the proposed transfer: "This action is consistent with previous planning, management, public input, and decisions for the Rogue River. There are no known or changing adverse environmental effects."

Appellants are using their protest of the approval of the transfer to charge that the 50/50 allocation is inequitable. We note that BLM arrived at this method of allocation after considerable deliberation. The Rogue River Policy Review Group was formed in 1976 to recommend an acceptable use level for the river. The group included private boaters, outfitters, a commercial lodge owner, representatives from Josephine and Curry Counties, an individual representing hiking interests, an Oregon Environmental Council representative, and an Isaak Walton League representative. The recommendations of the group were presented at public hearings in Oakland, California, and Portland, Gold Beach, and Grants Pass, Oregon. The State Scenic Waterway's director and BLM eventually arrived at the 50/50 allocation as a result of public reaction to the proposal of the Rogue River policy group. This decision was supported by an independent study of the Forest Service. BLM's allocation system is not arbitrary or capricious, but rather is based on facts assembled from study of use of the river and is a sound effort to protect the environment of the river. Outdoor Adventures, S.W., 50 IBLA 90, 93 (1980).

Appellant's contention that approval of the transfer is acquiescence by BLM in a transaction which promotes the interests of commercial operators over the boating public is without merit. We find that it is rather an attempt by BLM to maintain the status quo. In issuing permits, BLM recognizes its obligation to protect the interest of both classes of users. If the use of the river must, for the river's protection, be limited and if the rights of all are to be recognized, then the "free access" of any user must be limited to the extent necessary to accommodate the access rights of others. See Wilderness Public

Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979), cert. denied, Wilderness Public Rights Fund v. Andrus, 446 U.S. 982 (1980). Allocation of the limited use between the two groups is one method of assuring that the rights of each are recognized, and, if fairly done pursuant to appropriate standards, is a reasonable method and cannot be said to be arbitrary. See Wilderness Public Rights Fund v. Kleppe, supra. We find no error in the BLM decision which maintains the 50/50 allocation by transferring YMCA's permit to another commercial outfitter.

[2] The pertinent guidelines for authorization of float trips and transfer of this authorization are found at 43 FR 12093 (Mar. 23, 1978) and read as follows:

An authorized outfitter's authorization to conduct float trips is not a salable commodity. Commercial operations on the river must be understood as being a privilege, not a right. Any transfer of authorized use in conjunction with the sale of a business must be approved by the managing agencies prior to such a transfer. Disapproval may be based upon the lack of qualifications of the proposed transferee, the inability of the river and land resources to sustain the use, or other just cause.

The BLM decision concluded that the proposed transfer was in accordance with this provision because "YMCA listed the needed approvals in the terms of their sale and all permits transferred are without charge." This conclusion did not address the merits of appellant's charge that YMCA sold its river starts to ECHO. BLM responded to this charge in its answer as follows:

The appellants contend that transfer of the YMCA permit to ECHO is the sale of an authorization to conduct float trips. There is no dispute that the authorization is not a salable commodity. The 1978 controls found in 43 FR 12093 so provide. While the authorizations are not salable, the regulations recognize that a continuity in the issuance of yearly permits does exist. As noted in the District Manager's letter of December 16, 1980, to Garren (a copy of which has already been provided to the Board):

Until such time as all rights of YMCA are terminated as part of the transfer of interests to ECHO, YMCA has the same right as any other commercial operator on the river to have its permit considered for renewal. YMCA has a continuing record of use on the Rogue River from 1968. Since the permit system was initiated, yearly permits have been issued to YMCA by the Forest Service and the BLM and a separate permit has been issued by the State Marine Board.

Under permit regulations now in force on the river (43 F.R. 12091) a permit of (sic) the following year is denied if the outfitter takes commercial trips without a permit. Also a permit may be terminated for repeated violations of the permit conditions. For lesser violations such as the taking of an unscheduled trip, the regulations provide for the forfeiture of a trip in the outfitter's subsequent year's trip allocation. Therefore as can be seen, the regulations contemplate a continuity in the permits issued to the individual outfitters and that renewal be approved as a matter of course unless serious violations occur or major changes in the policy of the BLM require the alternation of the permit system.

In an attempt to preserve a continuity in the level of commercial use the BLM, Forest Service, and State Marine Board have also followed a practice of approving the transfer of an outfitter's permit to the purchaser of the outfitter's assets unless the potential transferee lacks qualifications, other just cause exists or the river and land are unable to sustain the use. These are the standards quoted above from the 1978 regulations.

(Answer at 10, 11).

BLM's enforcement policy relative to the regulation obviously does not extend to consideration of whether an outfitter sells its permit in connection with the sale of its business as evidenced by the following explanation of why it does not consider prices paid for transferred business:

These standards [1978 controls] do not specifically address the issue of the price paid for the assets of an outfitter, but even if they did the Medford District has concluded that it would be extremely difficult to determine the proportion of the purchase price of a company to allocate to a company's business, clientele, or reputation. For example, Metropolitan YMCA of Alameda County has an established clientele much of which may be serviced by ECHO if the proposed sale is consummated. Rather than attempt to place a value on this business interest, the BLM in Oregon has chosen to rely upon the fact that the permittee is under notice that the permit is not a salable commodity and that the BLM retains the ultimate right to approve or disapprove any transfer of a permit as well as the natural price competition for passengers between existing commercial operators on the river and those to whom a permit may be transferred to insure that permit rights are not sold.

(Answer at 12).

The BLM policy of not considering the purchase price of transferred business, and relying on outfitters being on notice of the sale prohibition to insure that river starts are not sold does not appear to be effective in deterring commercial outfitters from selling their river starts.

The sale notice circulated by YMCA offered the following items for sale stating that it would consider bids of \$30,000:

- 2 New 10 man Newco's with frames
- 2 Campway Shoshoni's with frames
- 4 Rogue Inflatables with frames
- 1 Avon Professional with frame

- 38 Maravia class five life jackets
- 30 Waterproof personal bags
- 25 9' oars for all boats
- 7 Sets oarlocks

- 1 New Raft Trailer

- 2 Custom dry goods boxes

Included with equipment - 26 full sized Rogue River Starts
[Emphasis added.]

Additionally, the YMCA official bid sheet contained this statement "In addition to the dollar amount listed above I am willing to give the following consideration to Alameda County YMCA groups for future river trips." Appropriate space was provided for completion.

It appears that YMCA publicly contemplated selling its river starts to the purchaser of its outfitters business. In light of this, and the prohibition against selling permits, BLM was obligated to investigate the nature of the YMCA/ECHO transaction. The record, however, clearly shows that prior to approval of the transfer BLM did not consider whether YMCA was in fact selling its river starts to ECHO. Thus, it is necessary to remand the case to have BLM determine prior to approving the transfer, whether YMCA did receive some consideration for its river starts as part of the consideration for the sale of its business since such a transaction would constitute just cause under the guidelines to disapprove the transfer.

In the future BLM may not abdicate its responsibility to investigate whether permits are being sold. Transfers are contemplated; sales are not. BLM may not approve any proposed transfer which involves the sale of a permit. If this means that transfers are effectively foreclosed, BLM has other options. If a commercial permittee desires to discontinue its use of the Rogue, it may forfeit its privilege to BLM. BLM may then distribute the use in a manner consistent with sound management policies. For example, BLM could (1) cancel the use; (2) reserve the use; (3) allocate the use to the common pool; (4) allocate the use to noncommercial users; or (5) reissue the permit to a new commercial operator by a procedure such as open government bidding or

other administrative determinations of which organization could provide the best service to the public. See the Environmental Assessment, approved October 28, 1980.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded to BLM for action consistent with this decision.

Gail M. Frazier
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Bruce R. Harris
Administrative Judge

